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18 May 1988
OCA 88-2421

NOTE FOR:

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C/ALD/OGC

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[Redacted]

C/Procurement Law Division/OGC

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FROM:

[Redacted]

Office of Congressional Affairs

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SUBJECT: DoD Authorization Bill--New Conflict of Interest Restrictions

1. Senator Nunn has added an amendment to the FY89 DoD Authorization bill that would prohibit DoD from awarding contracts to anyone who is an officer or employee of the U.S. Government. Attached is a copy of the amendment.

2. I would appreciate your review of the amendment to determine whether it would adversely impact on the Agency's contractual relationship with DoD.

[Redacted]

STAT

Attachment
as stated

Distribution:

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OCA/Leg/ [Redacted] (18 May 1988)

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AMENDMENT NO. 2076

(Purpose: To strengthen conflict of interest regulations relating to the submission of offers in connection with Department of Defense contracts by officers and employees of the Federal Government and business concerns and other organizations owned by such officers and employees)

Mr. NUNN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Georgia [Mr. NUNN], for Mr. ROTH, proposes an amendment numbered 2076.

Mr. NUNN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 131, between lines 13 and 14, insert the following:

SEC. 623. CONFLICT OF INTEREST REGULATIONS.

(a) IN GENERAL.—Not later than 120 days after the date of the enactment of this Act, the Secretary of Defense shall issue regulations that prohibit a contracting officer—

(1) from knowingly receiving any offer in connection with a contract to be awarded by the Department of Defense from an officer or employee of the Federal Government or from any business concern or other organization owned or substantially owned or controlled by one or more such officers and employees; and

(2) from knowingly awarding such a contract to—

(A) any person who, on either the date of the award of the contract or the date on which the Department of Defense received an offer from such person in connection with such contract, is an officer or employee of the Federal Government; and

(B) any business concern or other organization that, on either the date of the award of the contract or the date on which the Department of Defense received an offer from such business concern or organization in connection with such contract, is owned or substantially owned or controlled by one or more such officers and employees.

(b) EXCEPTIONS.—The Secretary of Defense may include in the regulations issued under subsection (a) such exceptions as he determines to be necessary in the interest of national security.

Mr. ROTH. Mr. President, the amendment I offer is a simple one intended to stamp out the practice of "insider bidding" for Government contracts by Government employees. While insider trading has been condemned by the courts, insider bidding has been condoned. The situation must be rectified.

On February 2, 1988, the Court of Appeals for the District of Columbia Circuit held that no Federal policy was violated when a Federal employee bid on a defense procurement contract, provided that the employee on winning the award terminated his Federal employment before receiving the award. In my opinion, the court applied Federal acquisition regulation 3.601, prohibiting awards to Government employees, in an overly technical manner, overlooking the conflict of in-

terest. The regulation seeks to protect against.

Such construction makes a mockery of the concept of "competitive" bidding. Is it fair if a Government employee, who may have inside information, is allowed to compete with outsiders? Is it fair that a Government employee who bids on a contract may avoid the obligation, equally undertaken by all bidders, to perform the contract by simply refusing to quit his employment? In other words, the Government employee has a chance to review and reconsider the economic wisdom of his bid—to take a second look—while other bidders remain obligated to perform if their bid is accepted. Finally, is it fair for a salaried Federal employee to compete against others who do not enjoy an equally secure position?

While it may not be fair, it is the law. The Court of Appeals for the District of Columbia Circuit so decided on February 2, 1988, in the case of Speakman Co. versus Weinberger. In short, the Court of Appeals took the view that FAR 3.601's prohibition of awards to Government employees applies only to the final stage of the competitive bidding process—the grant of the award—rather than to the entire bidding process. This is surprising in view of the regulation's express purpose "to avoid the appearance of favoritism or preferential treatment by the Government toward its employees." the Court of Appeals considered the word "award" to be "unambiguous" and found support for its position in the agency's similar view.

The Speakman case I am informed, has run its course. No further appeals are planned. It is not my intention to change the outcome, as regrettable as it is. Rather, I wish to make sure that the conflict-of-interest policy is applied to the entire competitive bidding process. I wish to make sure that the Speakman case is not repeated. My amendment requires the Secretary of Defense to issue regulations to apply the conflict of interest to bids as well as awards.

I urge the adoption of my amendment.

Mr. NUNN. Mr. President, the Federal acquisition regulation prohibits a contracting officer from knowingly awarding a contract to a Government employee or a business substantially owned or controlled by Government employees. The purpose is to avoid conflicts of interest and appearances of favoritism.

The agency head can grant an exception where there is a compelling reason to do so.

Senator ROTH's amendment will establish a complete prohibition. His amendment and his interest in this amendment arises from a case involving a Government employee who bid on a contract. When informed of the conflict rule, he resigned upon award of the contract. Senator ROTH was

concerned about the evasion of the rule.

Mr. President, our staff has gone over this in detail, as has the minority staff.

I urge the amendment be adopted.

The PRESIDING OFFICER (Mr. HOLLINGS). The Senator from South Carolina.

Mr. THURMOND. Mr. President, we have no objection to the amendment.

The PRESIDING OFFICER. If there be no further debate, the question is on agreeing to the amendment of the Senator from Delaware.

The amendment (No. 2076) was agreed to.

AMENDMENT NO. 2077

(Purpose: To require the Secretary of the Navy to report to Congress on the capabilities of the Navy to carry out missions requiring the use of small patrol boats)

Mr. NUNN. Mr. President, I send an amendment to the desk for Senator KENNEDY. This is an amendment requiring a report on small patrol boats of the Navy.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Georgia [Mr. NUNN], for Mr. KENNEDY, proposes an amendment numbered 2077.

Mr. NUNN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 171, between lines 2 and 3, insert the following new section:

SEC. . REPORT ON SMALL PATROL BOAT OF NAVY.

(a) FINDINGS.—Congress finds that—

(1) on April 23, 1988, officials of the Department of Defense announced that consideration was being given to the deployment of United States Coast Guard vessels to the Persian Gulf for duty in conjunction with the Navy; and

(2) according to public reports based on statements from officials of the Department of Defense, the Navy has a significantly inadequate number of small patrol boats in the Navy fleet of ships.

(b) REPORT.—The Secretary of the Navy shall submit a report to Congress within 60 days after the date of the enactment of this Act regarding the capability of the Navy to carry out missions requiring the use of small patrol boats. The Secretary shall include in such report—

(1) an evaluation of the ability of the Navy to carry out missions requiring the use of small patrol boats that are less than 150 feet in length;

(2) a discussion of the contingencies that would necessitate the use of small patrol boats (of less than 150 feet in length) rather than larger warships;

(3) a discussion of any plans the Navy has for eliminating the Navy's shortage of such boats; and

(4) such recommendations as the Secretary considers appropriate to strengthen the capabilities of the Navy to carry out effectively missions which would require the use of such boats.

Mr. NUNN. This is another simple report by the Secretary of the Navy